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# Supreme Court of the United States.

OCTOBER TERM, 1933.

Nos. 505-506.

MANHATTAN PROPERTIES, INC.,

vs.

IRVING TRUST COMPANY.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

vs.

IRVING TRUST COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF OF JOSEPH F. MANN, AMICUS CURIÆ, COUNSEL FOR NATIONAL ASSOCIATION OF BUILDING OWNERS AND MANAGERS.

Agreeable to the permission of the Court this brief is filed in the hope that it will prove helpful in the solution of the questions involved.

## Statement.

This brief is submitted in support of the following proposition.

The landlord suffers damage when his tenant becomes bankrupt—claim for such damage may be liquidated under Section 63(b) of the Bankruptcy Law. In this respect a lease is no different from other executory contracts. This proposition is dictated by public policy—to decide otherwise would be to approve the use of voluntary bankruptcy proceedings by corporations for the purpose of obtaining, with impunity, cancellation of leases. This proposition is supported both by the trend of the decisions of this Court and by the recent Amendment to the Bankruptcy Act.

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On behalf of The National Association of Building Owners and Managers which through its membership represents practically every important office building and thousands of loft buildings and apartment houses in practically every important city in the United States, improved properties assessed for taxes at more than seven billion dollars, we welcome this opportunity as *amicus curiæ* to present to this Court the deplorable legal status of the landlord when his tenant becomes bankrupt, a status now considered by this Court for the first time.

The other parties to these appeals will discuss the legal theories involved. We limit ourselves to pointing out some practical results of the standing interpretations of the Bankruptcy Law—results which we deem contrary

to the intention of Congress, contrary to the needs of society, contrary to the spirit of justice.

When a tenant files a petition in bankruptcy the landlord, under existing decisions in the District Courts and Circuit Courts of Appeal (the leading case in the Second Circuit is *In Re Roth and Appel*, (1910) 181 Fed. 667, 31 L. R. A. (N. S.) 270) is a creditor to the extent of rent due and unpaid at date of bankruptcy only. The landlord is not a creditor as to any rent or other lease obligation which was not due on that date. Of course, such rent and other obligations subsequent to bankruptcy are not wiped out by bankruptcy under these decisions. But if the bankrupt is a corporation, claims for such rent or other obligations subsequent to bankruptcy are valueless—all the property of the corporate bankrupt has passed to the Trustee in bankruptcy for distribution among the "creditors." The corporate bankrupt ceases to function, the claim of the landlord for future rent may exist theoretically—but not practically.

This state of the law would be unsatisfactory enough, but picture the dissatisfaction of landlords with the next development.

A voluntary petition in bankruptcy may be filed by a solvent person—in a voluntary petition no allegation of insolvency is necessary. Accordingly, a solvent, substantial, successful business concern can use bankruptcy to relieve itself of its lease obligations by filing a voluntary petition in bankruptcy. This is not only a possibility, it is a fact.

May we take the Court outside the record and picture a typical bankruptcy of this latest model. A solvent, sub-

stantial successful corporation—a chain store retail sales organization, owned say by the manufacturer whose goods it distributes—desires to relieve itself of its leases. It first organizes subsidiary corporations to take over its operation. It next files a voluntary petition in bankruptcy. Its receiver or trustee takes over its assets—stock of subsidiary operating companies. The old management continues—the loss and damage of receivership operation is eliminated or at least minimized. The trustee disaffirms all unprofitable leases. The subsidiary companies negotiate new leases for the stores on present market conditions. Then the former parent company—the manufacturer—makes an offer to the trustee to buy back the business and assets of the bankrupt. There is no other possible purchaser because the good will of these stores is associated with the manufacturer's product. The offer is accepted. A dividend (sometimes 100%) is paid to the "creditors."

But the landlords are not "creditors." The merchandise creditor is paid a dividend on his claim. Even the creditor with a contract for future goods will receive a dividend. The only contract obligation which remains completely unsatisfied is the lease obligation.

Is it any wonder that landlords generally feel outraged by the chain store bankruptcy "racket"?

Landlords recognize that bankruptcy laws are necessary—that it is in the interest of society in general that the embarrassed debtor should on surrender of his property be permitted a new start—that the creditor himself is benefitted by such surrender—that the loss which the creditor must suffer on the bankruptcy of his debtor is

part of the price he must pay to conduct his business as a member of society. What the landlord does not understand is why the brunt of such loss must be borne by the landlord.

Is the lease only a scrap of paper in bankruptcy?

These practical considerations are advanced because the doctrine of *In Re Roth and Appel* is based on practical grounds. These practical grounds, we believe, no longer are controlling. The doctrine that future rents are not provable in bankruptcy is not based upon the expressed will of Congress, but is the result of decisions of certain of the District Courts and Circuit Courts of Appeal that such claims are too contingent to be susceptible of proof. It is thought that these courts must have been, at least unconsciously, motivated by historical dogma in refusing to extend to leases the more liberal modern theories of proving in bankruptcy debts not yet matured. As Mr. Justice Holmes has said in *Gardiner* vs. *Butler & Co.*, (1918) 245 U. S. 603: "But the law of leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."

The modern law is expounded by *Maynard* vs. *Elliott* (1931), 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028. At least it can now be stated that mere contingency is no objection to the proof of a claim. The test seems rather to be uncertainty amounting to mere speculation. As Judge Learned Hand said in his opinion in the *Manhattan Properties* case, 66 Fed. (2nd) 470, it would be "hard to find an instance in which the amount of the claim could be more uncertain" than in *Maynard* vs. *Elliott, supra,* unless it was assumed that the endorser's

liability there allowed as a provable claim, would mature before the completion of the bankruptcy proceedings.

The liability for rent is obviously not uncertain in that it is beyond the landlord's control; it does not depend upon an event so fortuitous as to make it uncertain whether liability will ever attach, it has already attached at and before the bankruptcy; nor is the "contingency" such as to make any valuation of the amount of the claim impossible, it is simply a matter of mathematics based upon well known standards of appraisal and less subject to eventual error than the claim in *Maynard* vs. *Elliott, supra.*

The rule of *Maynard* vs. *Elliott, supra,* must be applied to future rents. The decisions in the court below were made on one basis only, *stare decisis.*

There is also ample basis for reversals upon a consideration and application of legislation now in force. The amendment, effective March 3, 1933, to the Bankruptcy Act, added the following as a part of Section 74(a), 11 U. S. C. A., Sec. 202(a):

> "A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act."

Section 63(b), 11 U. S. C. A., Sec. 103(b), is a part of the general Bankruptcy Act.

The argument frequently advanced that this sentence does not constitute a general amendment to the Act itself and has no force except in the extension proceedings otherwise provided for by the balance of Section 74(a), is

contrary to reason. The extension proceedings are complete with respect to landlords' claims for future rent without this sentence. In such proceedings, in that section described, creditors' claims are termed "debts" and it is stated:

> "The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act."

There is no sensible meaning to "liquidation" of a future rent claim under an extension proceeding. There is no adjudication, no distribution; and in fact, rental payments are already "extended" by the terms of the lease. It cannot be supposed that it was intended to give the landlords a right of such little benefit as a voice in extension proceedings only.

The intention of Congress is further disclosed from the debate in the Senate, the pertinent parts of which, as it appears on the "Congressional Record", are set forth as an appendix to this brief.

Senator Hastings, who was in charge of the Bankruptcy Act, and Senator Bratton, who offered the amendment making a claim for future rent a provable debt, believed that this was "an amendment affecting the rents under the whole law" (Appendix p. 11), and for this reason the amendment was temporarily withdrawn and later reintroduced by Senator Bratton and accepted by Senator Hastings when there was no longer any danger that this amendment

to the Bankruptcy Law generally would get the whole amendment into controversy (Appendix p. 12). It was, therefore, the conscious intention of Congress by these words to amend the Bankruptcy Act generally.

The amendment as to future rent was designedly intended to apply to all bankruptcy proceedings, either pending at the date of the enactment of the amendment or thereafter commenced. Section 2 of the amendatory act provides that it shall apply to all concerned, whether their interests or debts were acquired or incurred prior to the effective date of the Act, or thereafter, and that proceedings under Section 1 thereof "may be taken in proceedings in bankruptcy which are pending on the effective date of this Act."

We respectfully submit that the Bankruptcy Act permits the landlord to prove a claim in a tenant bankruptcy for such loss as the landlord may be expected to suffer by reason of the bankruptcy.

Respectfully submitted,

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## Appendix.

CONGRESSIONAL RECORD—SENATE—FEBRUARY 24, 1933—PP. 5058-9:

Mr. Bratton: Mr. President, may I have the attention of the Senator from Delaware? I desire to offer two amendments that relate to the same subject matter. I believe the Senator from Delaware will accept them.

On page 41, line 8, after the word "property," insert "including a claim for future rent."

Mr. Hastings: I certainly thought I had that in the section. I may say to the Senator that a great many applications have been made to me with respect to that, and I saw no objection to putting it in; but it may be that I did not get it in this particular section.

Mr. Bratton: I think it is not.

On the next page I desire to offer another amendment which relates to the same matter. I think both of them will be acceptable.

Mr. Hastings: May I inquire just where the Senator proposes to put that, please?

Mr. Bratton: On page 41, line 8, after the word "property," insert "including a claim for future rent."

Mr. Hastings: I have no objection to that amendment.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New Mexico to the amendment of the committee.

The amendment to the amendment was agreed to.

Mr. Bratton: Then, Mr. President, on the next page, page 42, line 6, after the period, I move to insert: "A

claim for future rent shall constitute a provable debt, and shall be liquidated under section 63 (b) of this act."

Mr. Hastings: Mr. President, will the Senator yield?

Mr. Bratton: I yield.

Mr. Hastings: Referring to the language just written into line 8, page 41, which I said I thought was in this section, I ask the Senator whether he has considered, on page 42, the language beginning in line 1?——

> The term "creditor" shall include for the purpose of an extension proposal under this section all holders of claims of whatever character against the debtor or his property, including a claim for future rent.

Mr. Bratton: Yes; I had considered that, but that describes the holder of the claim.

Mr. Hastings: I have no objection to the other amendment.

Mr. Bratton: I thought the definition of "debt" should include an express provision respecting future rent.

Mr. Hastings: Now, may we have the second amendment stated?

The Presiding Officer: Will the Senator send up his amendment?

Mr. Bratton: I send up the amendment, to be inserted on page 42, line 6, following the period.

The Presiding Officer: The amendment to the amendment will be stated.

The Legislative Clerk: On page 42, line 6, following the period, it is proposed to insert a new sentence, reading as follows:

> A claim for future rent shall constitute a provable debt, and shall be liquidated under section 63(b) of this act.

Mr. Hastings: I inquire of the Senator from New Mexico whether that is not an amendment affecting the rents under the old law. As I stated this morning, there are so many things that various people want corrected in the old statute that I was very much afraid to get into it for fear we would get into a great deal of trouble in connection with it; and I have sought in this bill in the other sections to prevent any controversy arising under the old act. Therefore I intended that those words should apply to these particular sections.

Mr. Bratton: Mr. President, I concur with the Senator that we should free ourselves of any contact with the old act; and I think I shall withdraw the amendment. I do not care to go into the old act. I think we should not do so.

Mr. Hastings: I thank the Senator.

Mr. Bratton: Let me ask the Senator from Delaware whether he thinks that with the amendment already adopted on page 41, line 6, a claim for future rent could be established and receive the same consideration and the same disposition under this measure that any other claim or any other debt would receive?

Mr. Hastings: Does the Senator mean without its being written in there?

Mr. Bratton: No; with the amendment already adopted.

Mr. Hastings: I have not any doubt of it, with the amendment already adopted; and my own notion about it was that it would be true without having it written in there at all, because we have undertaken in these sections to include all the claims that could be had against a debtor, so that when he got relief he might know that he had

relief from every kind of a claim that might be had against him.

Mr. Bratton: Mr. President, temporarily I shall withdraw the amendment offered at page 42, line 6.

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CONGRESSIONAL RECORD—SENATE—FEBRUARY 27, 1933—P. 5278:

Mr. Bratton: Mr. President, let me say to the Senator from Delaware that on Saturday I offered an amendment, to come in on page 42, line 6, and withdrew it temporarily. It was in this language:

> A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this act.

Upon further consideration I think that amendment should be included in the bill, and I hope the Senator will accept it.

Mr. Hastings: Mr. President, the Senator from New Mexico will recall that the only reason I objected to it was because I was afraid it would open the door to amendments to the general bankruptcy law. If we are now in a position where we are about to vote on the bill to-night and there is no danger of our getting into controversy by trying to amend the bankruptcy law generally, I will accept the amendment.

Mr. Bratton: I think, Mr. President, that such an amendment as I have offered is necessary in order to give the relief needed.

The Presiding Officer: The amendment offered by the Senator from New Mexico to the amendment will be stated.

The Chief Clerk: On page 42, line 6, after the word "act," it is proposed to insert the following:

> A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this act.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New Mexico to the amendment reported by the committee.

The amendment to the amendment was agreed to.